Inf^n Thomas Short
9
James Short

24.

December 18. 1770.

INFORMATION

John. Alex^r. James. Thomas
md 1768. June 1760.
James.

FOR

THOMAS SHORT Mathematical Inſtrument-maker and Optician in London,

AGAINST

JAMES SHORT, Nephew of the deceaſed James Short Optician in London, and heir of Conqueſt to him, and his Guardians.

THOMAS SHORT optician in London, is the youngeſt of four brothers-german, the eldeſt whereof John, died ſeveral years ago in North America, leaving a ſon, and other children, who are ſtill alive, and in good circumſtances. Alexander, the ſecond, cabinet-maker in London, died unmarried, upon the 5th of May 1768, without making any ſettlement.

The third brother James Short, likeways an optician in London, ſurvived his brother Alexander a few weeks, and alſo died unmarried. He had acquired a very conſiderable fortune, far exceeding, as is believed, L. 20,000 Sterling; and upon the 9th of September 1765 executed a diſpoſition in favours of his brother Alexander, his heirs and aſſignees, of ſome heretable debts he had acquired affecting the eſtate of Mr Montgomery of Broomlands, to the extent of about L. 1500 Sterling, whereupon infeft-

ment had followed. And beſides the other debts diſponed, there is thereby expreſsly made over to the ſaid Alexander Short a right of relief of L. 1000 Sterling, wherein the granter ſtood bound as cautioner for another; which diſpoſition contains procuratory of reſignation, and precept of ſaſine.

This diſpoſition was found in James's cuſtody at his death, and therefore muſt be held never to have been delivered, and bears the following clauſe: "Reſerving nevertheleſs full power and liberty "to me, at any time of my life, and even in the article of death, "to revoke and recall theſe preſents at my pleaſure; and to up-"lift, aſſign, gift, or otherways diſpoſe of the reſpective ſums "before-mentioned as I ſhall think proper, without conſent of "the ſaid Alexander Short, or his foreſaids, ſought or obtained "thereto, in the ſame manner as if theſe preſents had not been "granted: But in caſe I do not uplift, or otherways diſpoſe of "the ſubjects above diſponed, I hereby declare this preſent deed "to be valid, and to have all the force and effect of a delivered "evident, albeit the ſame be found in my cuſtody, or in the cu-"ſtody of any other perſon undelivered at the time of my de-"ceaſe, with the not-delivery whereof I diſpenſe for ever."

Upon the 30th of July 1766, the ſaid James Short executed a latter will and teſtament, whereby, after leaving certain legacies, particularly the ſmall ſum of L. 100 Sterling to Thomas Short his brother, he bequeathed the remainder of his whole eſtate to his brother Alexander Short, during his life, and after his death, to his nephew James Short, eldeſt ſon of his brother John Short, and to the heirs of his body; whom failing, to the third ſon of his ſaid brother John Short; whom failing, to other ſubſtitutes; in the belief, as is natural to think, that the above-mentioned diſpoſition was to have effect in favours of his brother Thomas Short, who is in narrow circumſtances, upon the failure of Alexander Short.

The eſtate of Broomlands, upon which theſe debts were ſecured, having been brought to a judicial ſale at the inſtance of the apparent heir, and purchaſed by Mr Hamilton of Bowertree-hill, he the purchaſer, brought a proceſs of multiple-poinding for having determined to whom he was to pay theſe ſums of money; and having therein called James Short the eldeſt ſon of the eldeſt brother, the heir of conqueſt both of Alexander the ſecond brother,

ther, and of James Short and Thomas Short the youngeſt brother their heir of line. In that proceſs it was argued before the Lord Kennet Ordinary, for James Short the ſon of the eldeſt brother, "That the above-mentioned diſpoſition in favours of Alexander "Short created no right in him, in regard he died before the "granter, and that that deed was found in the granter's repoſi-"tories at his death; wherefore theſe ſubjects deſcended to the "heir of conqueſt of James the granter." Whereupon the Lord Ordinary pronounced the following interlocutor: "Having con-'ſidered what is above ſet forth, prefers the ſaid James Short the "heir of conqueſt to the heretable debts in queſtion."

Of this judgement the ſaid Thomas Short having complained to the Lord Ordinary by a repreſentation, his Lordſhip, on the 20th of November laſt, "Having conſidered that repreſentation with "the anſwers thereto, refuſed the deſire of the repreſentation, "and adhered to the former interlocutor." But upon a ſecond repreſentation, his Lordſhip, on the 6th of December current, "Having conſidered that repreſentation, made *aviſandum* with the "cauſe to the whole Lords; and appointed parties procurators "to give in informations into the Lords boxes upon the 18th "current. In obedience to which appointment, what follows is humbly ſubmitted to your Lordſhips conſideration, upon the part of Thomas Short the youngeſt brother.

1*ſt*, That upon the ſuppoſal that no right was ever veſted in Alexander Short the ſecond brother, it ſeems neceſſarily to follow, that the ſubjects in queſtion, muſt now fall to the ſaid Thomas Short in the character of heir of line to Alexander Short. The diſpoſition was granted by James Short to Alxander his immediate elder brother, his heirs or aſſignees. That diſpoſition never was delivered, and Alexander died before the granter; ſo that tho' it ſhall be preſently ſuppoſed there never was any right in Alexander, yet ſtill that diſpoſition did not become thereby totally ineffectual. It was a deed *inter vivos* granted to the heirs of Alexander as well as to himſelf, and by theſe heirs muſt be underſtood his heirs at law, who, according to what is preſently ſuppoſed, that there was no right ever eſtabliſhed in the perſon of Alexander, muſt be conſidered as the immediate diſponees by that deed, the heirs of line being the favourites of the law, and always underſtood to be called to a ſucceſſion, where it does not appear that

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they are excluded either by an expreſs deſtination or by a proviſion of the law: For it is thought it cannot be maintained, that however the right of Alexander Short by his death before his brother James the granter of the deed, became wholly void; that therefore the right of his heirs, who are expreſsly called by that diſpoſition, became likewiſe extinguiſhed.

But 2*dly*, Upon the ſuppoſal that there was in this caſe a right eſtabliſhed in the perſon of Alexander Short, it is humbly ſubmitted to the Court, if that right muſt not be underſtood to have fallen to him by ſucceſſion, and therefore, to devolve now upon his heir of line. The Lords will pleaſe obſerve, that though this diſpoſition was granted by James Short in favours of his immediate elder brother Alexander, his heir at law in theſe ſubjects, failing of his own children ſimply without the condition expreſſed in caſe heirs of the granter's body ſhould fail, yet it could poſſibly take no effect, unleſs that condition ſhould exiſt according to the famous *L.* 102. " De conditionibus et demonſtrationibus; " cum avus filium ac nepotem ex altero filio heredes inſtituiſſet, " a nepote petiit ut ſi intra annum trigeſimum moreretur here- " ditatem patruo ſuo reſtitueret; nepos, liberis relictis, intra æta- " tem ſupraſcriptum, vita deceſſit: Fidei commiſſi conditionem " conjectura pietatis reſpondi defeciſſe, quod minus ſcriptum " quam dictum fuerat inveniretur." Taking then the diſpoſition in this light, as it appears it neceſſarily muſt be taken, that it was only granted by James Short to Alexander the immediate elder brother upon the failure of heirs of his own body; it is plain, it was granted to him in the character of preſumptive or apparent heir, and therefore in his perſon muſt be conſidered not as conqueſt, but *tanquam præceptio hereditatis*; and conſequently muſt deſcend from him to Alexander's heir of line, according to the opinion of the learned Craig, Lib. 2. Diege 15. ſec. 17. whoſe words are: " In hoc conquæſtu notandum eſt, conquæſtum non " dici quod quis ex avo vel patre capit, ſi eo tempore quo capit " erat proxime ſucceſſurus; non enim tum dicitur conquæſtus " ſed tanquam præceptio hereditatis, et qui accipit pro herede ſal- " tem univerſali ſucceſſore habebitur; et hoc inter aſcendentes " et deſcendentes. Sed in collaterali ſucceſſione alia ratio eſt; " nam ſi frater fratri quod dederit licet, is ei immeditate ſuc- " ceſſurus videatur, tamen non cenſetur præceptio hereditatis, ſed

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" merus conqueſtus, et quaſi alienatio in extraneum facta, *niſi id* " *expreſſe dicatur alienationem factam, in fratrem tanquam ſucceſſurum.*"

It was argued for James Short the heir of conqueſt: 1*ſt*, That ſuppoſing no right ever to have been eſtabliſhed " by this deed in " the perſon of Alexander Short, yet the ſubjects thereby diſpo- " ned, muſt deſcend to the ſame ſeries of heirs theſe ſubjects would " have deſcended to, if ſuch right had been in his perſon, and " conſequently, to his heirs of conqueſt, as theſe would have " been truly conqueſt in him. 2*dly*, That if no right ſhall be " underſtood ever to have been in Alexander Short, that diſpoſi- " tion muſt by his death before his brother the granter, be held " as totally vacated, and conſequently, the ſubjects thereby diſ- " poned, fall to be taken up by the heir of conqueſt of James " Short, as in *hereditate jacente* of him. And 3*dly*, If there was " in this caſe a right veſted in the perſon of Alexander Short, as " there truly ſeems to have been, that right was not heretage, but " conqueſt in him, and therefore falls now to his heir of con- " queſt; and that it was conqueſt in him, is agreeable to many " deciſions of the Court; particularly, that of the 22d of No- " vember 1765, Scot *contra* Boſwall; that of the 17th of Decem- " ber 1672, Lady Spencerfield *contra* laird of Kilbrachmont, and " that of the 22d December 1674, heirs-portioners of Seton *con-* " *tra* Seton; in all which it was found, that a brother taking " ſubjects under ſuch a diſpoſition as the preſent, was not un- " derſtood to be liable for his predeceſſor's debts, as heir *precepti-* " *one hæreditatis*: That Alexander Short muſt here be conſidered " as a ſingular ſucceſſor, as at the time of the deed there was a " poſſibility the granter might have had nearer heirs: That the " ſuppoſed implied condition of failing heirs of the granter's bo- " dy, can make no difference, any more than if ſuch condition " had been expreſſed, becauſe, ſtill the right of Alexander was " by a ſingular title, there never having been any right in thoſe " nearer heirs, according to the rule, that *poſſitus in conditione,* " *non cenſetur poſitus in inſtitutione.*"

To theſe arguments the following anſwers are now humbly ſubmitted to the conſideration of the Court. That with regard to the firſt and ſecond thereof, the conſequence by no means follows, that ſuppoſing no right to have been eſtabliſhed in Alexander Short, yet that the ſubjects diſponed muſt deſcend in the

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ſame manner as if ſuch right had been eſtabliſhed in him; or that ſuppoſing the diſpoſition to him gave him no right by reaſon of his death before the granter, the ſubjects therein contained muſt now fall to the heirs of conqueſt of the granter, as it is humbly thought, that if no right was in Alexander Short, theſe ſubjects can never be conſidered as conqueſt in him, and now belong to his heirs at law, that is, to thoſe perſons having that character in them, though without any ſervice as heirs to him: That, however, he, by his death before the granter in whoſe hands that deed remained, might be underſtood never to have had any right to the ſubjects thereby diſponed; yet ſtill, that deed not being a teſtament, but of the nature of a deed *inter vivos*, though to take effect only after the granter's death, muſt be good in favours of Alexander Short's heirs, that is, his heirs at law, his heirs being expreſsly named in that deed as well as himſelf.

And to the *third* of the above mentioned arguments, whereupon, indeed, the preſent queſtion ſeems chiefly to depend, it is anſwered, That any right in Alexander Short muſt be conſidered as a right ariſing to him from ſucceſſion and not from conqueſt. That right was granted to him to ſubjects which fell to him upon the granter's death, without heirs of his own body as heir of conqueſt to him in the legal courſe of ſucceſſion. That right was never delivered to him, but remained in the granter's hands, and muſt be underſtood to have been conditional in caſe the granter ſhould have no heirs of his own body, and therefore to have been granted in the character of him who was *alioqui ſucceſſurus*. It is humbly thought, that the condition, that the granter's iſſue ſhould fail was naturally implied; but even, on the contrary ſuppoſition, as this was a revokable deed, and remained in the granter's hands, it falls neceſſarily to be preſumed, that he would have prevented any effect of it, either by recalling or deſtroying it if he had children; ſo that ſtill it muſt be conſidered as a deed granted by James to Alexander Short only in the character of heir to him, and that James Short himſelf conſidered the right created by him in his brother Alexander Short, as a right of ſucceſſion, ſeems plain from this circumſtance, that he made over to him a right of relief of the L. 1000 debt. This ſuppoſes him to be liable in payment of that debt to the creditor, which he was not, if he was a ſingular ſucceſſor to his brother, but only if he was heir to him.

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That the deciſions quoted ſeem, by no means, to apply to the preſent caſe; for becauſe a brother, who is *alioqui ſucceſſurus*, his having accepted a diſpoſition, does not make him univerſally liable to the granter's debts as ſucceſſor to him *preceptione hereditatis*, it by no means follows, that the ſubject diſponed to him ſhould be conſidered as conqueſt and not as heretage, that of an univerſal paſſive title being penal and unfavourable in law; whereas, on the other ſide, it appears to be very favourable, that a perſon who was otherways to ſucceed in the due courſe of law ſhould be conſidered as a legal ſucceſſor in the ſubjects conveyed to him in a diſpoſition granted by his predeceſſor. And beſides, it ſeems to appear from all theſe deciſions, that there the diſponees had accepted of the ſubjects diſponed during the life of the granter, while there was a poſſibility of nearer heirs, which nearer heirs were thereby excluded; whereas, in the preſent caſe, Alexander Short the diſponee died before James Short the granter, in whoſe cuſtody the diſpoſition remained, ſo that Alexander Short could never be underſtood to have accepted of the ſame whatever right might have been in him thereto; and any ſuch right muſt be underſtood only to have been conditional, in caſe heirs of the granter's body failed, which was ſtill pendent till his death: If indeed it had ever been found by the court, that a brother's accepting a diſpoſition made in his favours, under the expreſs or implied condition, that the heirs of the granter's ſhould fail, was no *preceptio hereditatis*, ſo as to make the diſponee univerſally liable for his brother's debts. Some argument might have been drawn, in favours of James Short the heir of conqueſt, but it does not appear, that the above quoted deciſions, in the circumſtances thereof can have the leaſt influence upon the preſent caſe, where the diſpoſition plainly implied the condition, that the granter's iſſue ſhould fail, where that condition was pendent even after the diſponees death, and when till the granter's own death he had full power over the deed.

That in this caſe, Alexander Short can never be conſidered as a ſingular ſucceſſor, becauſe, though at the time of the deed, there was a poſſibility the granter might have had heirs of his own body; yet, therein there was always implied this condition, that the ſame ſhould only take effect, in caſe theſe heirs ſhould fail; and at any rate, in the other event, he might have recalled the diſpoſition, as it is preſumable he would have done; ſo that there never

never was any right effectually eſtabliſhed in the perſon of Alexander Short.

That it is admitted on the part of Thomas Short, that the implied condition, failing heirs of the granter's body, muſt have the ſame effect as if that condition had been expreſſed: But it is humbly contended, that, if that condition had been expreſſed, the right of Alexander Short, in theſe ſubjects would have been heritage not conqueſt; becauſe they were diſponed to him in the event of his being *alioqui ſucceſſurus*, and theſe he fell to take up if he had ſurvived the granter not as heir ſubſtitute to the granter's iſſue, who it is admitted, though *poſiti in conditione*, are not to be held *poſiti in inſtitutione*, but as immediate diſponee to the granter himſelf in the event that had exiſted of the failure of heirs of his body.

To ſum up the whole argument offered for the ſaid Thomas, upon this it comes briefly to this, that if the right in Alexander Short, by the above diſpoſition, was only conditional if the children of the granter ſhould fail, it was plainly a right in him, *tanquam alioqui ſucceſſuro*; and if it was a right that would have taken effect, even to the excluſion of the granter's children, the preſumtion lies, that he, in the event of his having children, would have deſtroyed or altered that deed, as he had to the day of his death full power over the ſame; So that in every view the right of Alexander Short, muſt be conſidered a right granted to a perſon who was *alioqui ſucceſſurus*, and therefore a *preceptio hereditatis*.

In reſpect whereof, &c.

DAVID GRÆME.